Nos. 11,943 - 11,944

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES M. AGNEW, JR., GEORGE AKI, HOWARD ALLRED, JOAQUIN BARRASA, HENRY BEHRENS, THEO. BRYANT, ALEX. CHESTER, CLEMENT CHUN, RICHARD CHUNG, HUMBERTO CLARO, WM. DARDING, CLARENCE DAVIS, ROBERT DAVIS, EDWARD DONER, ALFRED EGGEN, FRED ELIAS, ABE GOLDSTEIN, LEO GRUSZUECZKA, JACKSON HARRIS, COLLINS HEDGEPATH, EDMUND HOLLAND, HUGO HORNLEIN, THEO. HOWARD, STEPHEN JOSEPH, FRED JOST, FRANK KAMKI, THOMAS KELLEHER, CHARLES KEYES, JOHN KIM, RICHARD KIM, CHARLES MAROIS, GEORGE MASSEY, CARLOS MATTOS, JOHN MENDES, MATT MESKELL, GILBERT MONREAL, ALFRED MORDEN, SAMUEL MORRIS, A. MORTENSON, ERWIN O'NEALE, CHESTER PIEKOS, ALFRED RYE, JOHN SCHUCK, WM. SMITH, HENRY STOLZ, IVAR VIKE, ROBERT WAKELAND, CHESTER ZACKIEWICZ,

Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD. (a corporation), and UNITED STATES OF AMERICA,

Appellees.

No. 11,943

(CONSOLIDATED CASES)

JOHN W. GRIFFIN, WILLIAM E. HAMILTON, JOSEPH D. HEBBLE, FRANK KNOWLES, THOMAS D. LAMSON, K. LAWLER, JOHN NAPOLEON, SYDNEY O. OLSEN, JOHN J. SAXTON, JOSEPH C. SMITH, MATTHEW C. SULLIVAN, JON THUESEN, and JOHN VANDERVEER,

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BRIEF FOR APPELLANTS.

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Appellees.

No. 11,944

BRIEF FOR APPELLANTS.

The appeal is by the libelants in actions by seamen to recover wages and maintenance. The actions were consolidated for trial with two similar actions. (No. 11,943, A 286.) They have appealed from the final decree entered therein (No. 11,943, A 605-609) because the District Court did not award them enough. The appeals are presented on typewritten apostles with a reporter's transcript in common (No. 11,943, A 298-558) and with the original exhibits and depositions before the court (No. 11,943, A 622).

STATEMENT OF JURISDICTION.

The libels in these causes were by seamen to recover wages and maintenance. (No. 11,943, A 2-6; No. 11,944, A 1-6.) The District Court had jurisdiction. (28 U.S.C.A., sec. 41 (3).) Final decree was entered by the District Court in the consolidated actions on November 18, 1947. (No. 11,943, A 605-609.) An order allowing an appeal in each cause was entered February 4, 1948. (No. 11,943, A 614; No. 11,944, A 52-53.) The appeals were timely. (28 U.S.C.A., sec. 230.) Jurisdiction of this court to review the final decree of the District Court is therefore sustained by section 128 of the Judicial Code. (28 U.S.C.A., sec. 225.)

STATEMENT OF THE CASE.

The basic facts are undisputed. Each appellant was a member of the crew of the vessel President Harrison when it sailed from San Francisco to the orient on October 17, 1941. (No. 11,943, A 587.) The appellee American President Lines was the owner and operator of the vessel (No. 11,943, A 587) and it was a twin screw vessel with a power tonnage of 17,509 tons (No. 11,943, A 342/7 to 343/13). Each had signed the shipping articles on October 15, 1941. (No. 11943, A 564/1-3.) Each appellant in No. 11,943 was a member of the unlicensed personnel. (No. 11,943, A 589-590.) He was also a member of the Sailors' Union of the Pacific or of the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association. (No. 11,943, A 589-590.) Each appellant in No. 11,944 was a member of the licensed personnel. (No. 11,943, A 590.) He was also a member of the Marine Engineers Beneficial Association or of the National Organization of Masters, Mates, Pilots of America. (No. 11,943, A 590.)

The following rider on the shipping articles was applicable to unlicensed personnel and the appellants in No. 11,943:

> "Rider for Passenger & Freight Vessels in the Transpacific & Straits Settlement Service
>
> 1. The American President Lines agrees to pay an emergency wage increase to the unlicensed crew of the SS President Harrison, Voyage 55, as follows:
>
> 2. The monthly basic wages as shown in the following agreements between the Pacific Ameri-

can Shipowners Association and the Unions are to be used as the basis for payment of this increase:

Sailors' Union of the Pacific—Effective October 10, 1939.

Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association—Effective October 1, 1941.

Marine Cooks and Stewards' Assn. of the Pacific Coast—Effective July 5, 1940.

3. To all employees entitled to received basic wages of $120.00 per month or less under said agreement, the sum of $80.00 per month.

4. To all employees entitled to receive in excess of $120.00 per month under said agreement, 66⅔% of such basic monthly wage.

5. The emergency wage increase to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound.

6. In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port and the employee shall be repatriated to a Continental United States port. War bonuses at the rates specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein.

7. In the event the loss of personal effects by any member of the unlicensed crew, due to neces-

sity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the Company agrees to reimburse each unlicensed man so affected by an amount not in excess of $150.00.

8. War risk insurance in the sum of $5,000 shall be furnished to members of the crews on this voyage.

AMERICAN PRESIDENT LINES, LTD.

(Seal)
U. S. SHIPPING COMMISSIONER
Port of San Francisco, Calif.
/s/ R. A. Frediani."

The following rider on the shipping articles was applicable to licensed personnel and the appellants in No. 11,944:

"RIDER FOR PASSENGER & FREIGHT VESSELS IN THE TRANSPACIFIC & STRAITS SETTLEMENT SERVICE

1. The American President Lines agrees to pay an emergency wage increase of 60% of their basic wages to the licensed crew of the SS President Harrison, Voyage 55.

2. The monthly basic wages as shown in the following agreements between the Pacific American Shipowners Association and the Unions are to be used as the basis for payment of this increase:

Masters, Mates and Pilots—Effective December 30, 1939.

Marine Engineers Beneficial Assn.—Effective May 1, 1940.

American Communications Association—Effective July 13, 1940 and as amended by arbitration award of May 3, 1941.

3. This emergency wage increase to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound.

4. In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreements between the Pacific American Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port, and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in paragraph 1, hereof, shall be paid while employees are in the war zones defined herein.

5. In the event of loss of personal effects by any member of the licensed crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the Company agrees to reimburse such licensed men so affected by an amount not in excess of $500.00.

6. War risk insurance in the sum of $5,000 shall be furnished to licensed members of the crew on this voyage in accordance with agreements.

AMERICAN PRESIDENT LINES, LTD.

(Seal)
U. S. SHIPPING COMMISSIONER
Port of San Francisco, Calif.
/s/ R. A. Frediani
Deputy U. S. Shipping Commissioner."

The President Harrison crossed the 180th meridian westbound on October 28, 1941. (No. 11,943, A 3, 10; No. 11,944, A 3, 9.) It was intercepted by the Japanese on December 8, 1941, grounded on Shaweishan Island, China, and vessel and crew were captured by the Japanese. (No. 11,943, A 312/3 to 317/3, 588.) The crew were captured on the island and were ordered back to the vessel by the Japanese the next day. (No. 11,943, A 317/2-10.) They remained aboard the vessel from December 9, 1941, until they were put ashore at Shanghai, China—some on March 5, 1942, others on March 12, 1942. (No. 11,943, A 317/11 to 318/23.)

The internment of the unlicensed personnel by the Japanese west of the 180th meridian lasted from December 8, 1941, until August 15, 1945. (No. 11,943, A 3, 10-11, 588.) The internment of the licensed personnel by the Japanese west of the 180th meridian lasted from December 8, 1941, until September 15, 1945. (No. 11,944, A 3, 9.) Thereafter, the appellants were repatriated by the United States Government to a continental United States port. (No. 11,943, A 588.) On the repatriation voyage the appellants in No. 11,943 (unlicensed personnel) were west of the 180th meridian for a period of 17 days. (No. 11,943, A 602.) On the repatriation voyage the appellants in No. 11,944 (licensed personnel) were west of the 180th meridian for periods varying from 9 to 28 days. (No. 11,943, A 603.)

Appellants were discharged at a continental port of the United States. (No. 11,943, A 4, 11-12; No.

11,944, A 3.) At the time of their discharge they were paid basic wages (except maintenance) and emergency wages to the date of discharge. (No. 11,943, A 4, 11-12; No. 11,944, A 3, 10.) They were also paid war bonuses from the date the vessel crossed the 180th meridian westbound (October 28, 1941) to the date the vessel was captured by the Japanese (December 8, 1941). (No. 11,943, A 4, 11-12; No. 11,944, A 3, 10.) They were not paid war bonus for the period commencing with their capture by the Japanese west of the 180th meridian and ending with their crossing of the 180th meridian eastbound on repatriation. Nor were they paid any maintenance. A stipulation at the trial was as follows (No. 11,943, A 378/2-7):

> "The Court. But in like manner is also admitted there is nothing that results from the manner or the amount of payments of the money that was paid to the men that has deprived them of the right to assert this claim in court. There is nothing, no legal waiver involved, is that correct?
>
> Mr. Adams. Yes."

By their respective libels the appellants sought to recover war bonus at the rates stipulated in the shipping articles for the period they were west of the 180th meridian after capture. They also sought maintenance from capture to liberation. In No. 11,943 (unlicensed personnel) each appellant claimed war bonus from December 8, 1941 (the date of capture) to October 13, 1945 (the date of crossing the 180th meridian eastbound on repatriation). No. 11,943, A 4.) The average claim was $3693.33; others ranged from $3732.11 to $5185.95. (No. 11,943, A 7.) Each

appellant in No. 11,943 also claimed maintenance at the rate of $3.75 a day and in the sum of $5051.25 for the 1347 days he was interned west of the 180th meridian. (No. 11,943, A 7.) Similar claims for war bonus were made by the appellants in No. 11,944 (licensed personnel) in varying amounts ranging from $4026.49 to $9023.89. (No. 11,944, A 4, 6.) Each appellant in No. 11,944 also claimed maintenance at the rate of $6 a day and in the sum of $8268 for the 1378 days he was interned west of the 180th meridian. (No. 11,944, A 4, 6.)

In both causes a petition for leave to intervene was filed by the appellee United States of America. (No. 11,943, A 52-56; No. 11,944, A 44-47.) Each alleged that under instructions from his government the Swiss Consul at Shanghai had advanced moneys to the appellants at the request of the United States of America, and that repayment thereof in part had been guaranteed by the appellee American President Lines. The purpose of the petitions was to prevent overpayment or double payment in the event appellants were awarded maintenance. No order was made by the District Court on these petitions.

The District Court found that the shipping articles did not entitle appellants to the war bonus they claimed, but that they were entitled to war bonus for the time consumed west of the 180th meridian on the repatriation voyage. (No. 11,943, A 592-597.) The District Court also found that appellants were not entitled to maintenance. (No. 11,943, A 597-598.) By the final decree each appellant in No. 11,943 was

awarded a sum ranging from $35.82 to $40.82 for the 17 days he was west of the 180th meridian on the repatriation voyage (No. 11,943, A 602, 608) and in No. 11,944 each appellant was awarded a sum ranging from $38.62 to 110.62 for whatever number of days he was west of the 180th meridian on the repatriation voyage. (No. 11,943, A 603, 609.)

The question of war bonus for interned seamen was before this court in *Steeves v. American Mail Line,* 9 Cir. 154 F. 2d 24. Appellants rely strongly on the authority of that case for a reversal of the final decree with directions to the trial court to award appellants war bonus as claimed. The question of maintenance for interned seamen is one of first impression. Appellants rely on the general maritime law in support of their position that the District Court should have allowed them maintenance as claimed.

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON.

The assigned errors are the same in each cause, and each appellant relies upon each of his assigned errors, namely, No. (1) to No. (10), both inclusive. (No. 11,943, A 615-616; No. 11,944, A 54-55.)

ARGUMENT OF THE CASE.

1. THE SHIPPING ARTICLES WERE PLAIN, CERTAIN, AND UNAMBIGUOUS, AND CLEARLY ENTITLED THE LIBELANTS TO WAR BONUS, AT THE RATES STIPULATED THEREIN, FROM THE DATE OF THEIR CAPTURE BY THE JAPANESE TO THE DATE THEY CROSSED THE 180TH MERIDIAN ON THE REPATRIATION VOYAGE.

Assignment of Error No. 5: "The court erred in finding that the riders attached to the shipping articles were ambiguous, vague, or uncertain." No. 11,943, A 615; No. 11,944, A 54-55.)

Assignment of Error No. 6: "The court erred in finding that the shipping articles with the riders attached thereto and the supplementary bonus agreements must be taken as part of the same or a single transaction." (No. 11,943, A 615-616; No. 11,944, A 55.)

A certified copy of the shipping articles here involved was admitted in evidence at the trial as Libelants' Exhibit No. 1 (No. 11,493, A 302/23-24, 304/12-18), and is before this court (No. 11,493, A 622). Attached thereto were the riders quoted in the statement of the case. They were prepared by the respondent and appellee American President Lines. (No. 11,943, A 461/14-20, 541/10-18.)

When the shipping articles were signed on October 15, 1941, it was provided by 45 U.S.C.A., sec. 564 (5):

> "The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or

upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the name, and shall contain the following particulars: * * *

Fifth. The amount of wages which each seaman is to receive."

Under the riders to the shipping articles here involved the American President Line agreed to pay the crew a "war bonus" or as it was alternatively termed "an emergency wage increase". That a "war bonus" is "wages" within the meaning of above quoted section 564, is not open to doubt. (*Glandzis v. Callinicos,* 2 Cir. 1944, 140 F. 2d 111, 113-114; *Lakos v. Saliaris,* 4 Cir. 1940, 116 F. 2d 440, 442-443.)

As the law required the shipping articles of the President Harrison to contain "the amount of wages which each seaman is to receive", it is obvious that the law was violated if the shipping articles were indefinite and uncertain as to the amount of "war bonus" each seaman was to receive. The fair assumption, then, is that in preparing the riders for the shipping articles the American President Lines intended telling each seaman unequivocally just what

"war bonus" he would get if he went into a "war zone". That effect must be given to the riders if it is possible and rational to do so. (*The Capillo* (*Steeves v. American Mail Lines*), 9 Cir. 1946, 154 F. 2d 24, 25.) And to accomplish that effect, moreover, the shipping articles must be most strongly construed against the American President Lines. (*The Thomas Tracy,* 2 Cir. 1928, 24 F. 2d 372, 373; *The Western Cross* (*McDonald v. United States*), 2 Cir. 1923, 292 F. 593, 594-595; *The Florence Olson,* 9 Cir. 1922, 283 F. 11, 12; *The Catalonia,* D. C. Va. 1916, 236 F. 554, 555-556.)

The riders in question refer to "Trans-Pacific" and "Straits Settlements" service. The President Harrison sailed from San Francisco to the Orient and the service was "Trans-Pacific". By the express terms of the riders the American President Lines agreed to pay a war bonus "from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound". And by the express terms of the riders the American President Lines agrees to pay this war bonus "while employees are in the war zones defined herein". That a war zone was defined in the riders, is not susceptible to doubt. When the President Harrison crossed the 180th meridian westbound on its way to the Orient it entered a war zone defined by the riders, and the crew were in that war zone so long as they were in the Orient west of the 180th meridian.

The promise of the American President Lines was to pay war bonuses *"while employees are in the war zones"*. A reasonable construction of this language

will not permit it to be said that it means that the right to war bonuses was conditional upon the employees being in the President Harrison or any other vessel in the war zone. That construction is confirmed when the language is considered with its context. It appears in the second sentence of a separately numbered paragraph covering the situation where the crew might no longer have a vessel. The first sentence of the paragraph provides for payment of basic wages and emergency wages to the date the members of the crew arrive in a Continental United States port "in the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage". Those particular wages are made payable regardless of whether the vessel becomes a casualty inside or outside a war zone. The second sentence of the paragraph merely continues on with the subject of wages, and provides for the payment of war bonuses *conditional upon the employees being in the defined war zone they were promised war bonuses for entering and for which the vessel headed when it sailed from San Francisco.* Taken with its context the plain meaning of the second sentence of the paragraph is this: "In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, . . . war bonuses at the rate specified . . . shall be paid while employees are in the war zones defined herein".

Thus it is apparent that the shipping articles here involved were plain, certain, and unambiguous, and clearly entitled the libelants to war bonuses, at the

rates stipulated therein, from the date of their capture by the Japanese to the date they crossed the 180th meridian on the repatriation voyage.

The District Court therefore erred in finding "that the riders attached to the shipping articles were ambiguous, vague, or uncertain" (No. 11,943, A 592), and in finding "that the shipping articles with the riders attached thereto and the supplementary bonus agreements must be taken as part of the same or a single transaction" (No. 11,943, A 591-594). *(The Capillo,* 9 Cir. 1946, 154 F. 2d 24, 25-26.)

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2. **THE COURT ERRED IN ADMITTING ORAL AND WRITTEN EVIDENCE TO CONTRADICT THE TERMS OF THE RIDERS ATTACHED TO THE SHIPPING ARTICLES.**

Assignment of Error No. 10: "The court erred in admitting oral and written evidence to contradict the terms of the riders attached to the shipping articles." (No. 11,943, A 616; No. 11,944, A 55.)

Appellants are mindful that courts of admiralty do not adhere to common law rules of evidence *(The Denny,* 3 Cir. 1942, 127 F. 2d 404, 408), and that evidence should be liberally admitted in the trial court, subject to objection, for the benefit of the appellate court where the cause is heard *de novo (The Andrea F. Luckenbach,* 9 Cir. 1935, 78 F. 2d 827, 828.) However, "it is not to be supposed that evidence of every sort is competent in admiralty" *(Carson v. American S. & R. Co.,* D. C. Wash. 1928, 25 F. 2d 116, 119), and

evidence should be excluded where "it is so utterly irrelevant and immaterial that there could not possibly be any doubt about it" *(Minnesota S. S. Co. v. Lehigh Valley Tsp. Co.,* 6 Cir. 1904, 129 F. 22, 29).

The vast number of original exhibits before this court on the appeals calls for explanation at this point. These appellants introduced in evidence a certified copy of the shipping articles with riders (Libelants' Exhibit No. 1, No. 11,943, A 304), and the applicable shipowner-union agreements referred to in the riders (Libelants' Exhibits Nos. 2, 3, 4, and 5, No. 11,943, A 304-309).

Respondent American President Lines offered in evidence 209 exhibits of which 117 were merely marked for identification. (No. 11,943, A 417.)

A defense raised by the answers was that the shipping articles of October 15, 1941, were to be interpreted and controlled by decisions of the Maritime War Emergency Board created in December, 1941, and particularly its decision No. 5 of February 21, 1942. (No. 11,943, A 18-22; No. 11,944, A 18-21.) Eighteen exhibits grouped as Respondent's Exhibit B have reference to that defense. (No. 11,943, A 458.) The same defense was urged and held without merit in *The Capillo,* 9 Cir. 1946, 154 F. 2d 24, 25-26. The defense was also held without merit in the present cases. *(Agnew v. American President Lines,* D. C. Cal. 1947, 73 F. Supp. 944, 950.) While it was undoubtedly error to admit these exhibits in evidence, it is obvious, of course, that the error cannot be said to be prejudicial.

Ten exhibits grouped as Respondent's Exhibit C have reference to the issue of maintenance (No. 11,943, A 459), a subject discussed in a later subdivision of this brief.

A defense raised by the answer, and which the trial court sustained, was that the shipping articles were ambiguous and were to be interpreted and controlled by shipowner-union agreements not referred to in the shipping articles. (No. 11,943, A 13-16; No. 11,944, A 12-17.) Sixty-one exhibits grouped as Respondent's Exhibit A have reference to that defense. (No. 11,943, A 434-440.) Some of them duplicate libelant's exhibits. In many instances they consist of agreements, telegrams, and letters bearing dates long after the shipping articles of October 15, 1941, were signed. All were admitted subject to the objection that they were immaterial. (No. 11,943, A 431.) As the shipping articles were unambiguous, it was error for the court to admit these exhibits and testimony supporting them. And as the court based its decision thereon the prejudice from the error is obvious. As to the law, it is enough to quote from *The Capillo,* 154 F. 2d 24, where this court said, at page 25:

> "In construing the articles we are controlled by the elementary axiom that, if possible we will give effect to specific contractual language rather than to hold it nugatory. * * * It is a matter of construction whether such union agreements are applicable to make nugatory the specific agreement for the internment."

One hundred and fifteen exhibits were offered in evidence as Respondent's Exhibit H for Identifica-

tion, and the court reserved a ruling as to whether they should be admitted in evidence. (No. 11,943, A 522.) They consisted of various types of riders attached to shipping articles by various shipowners at various times. Appellants were not connected with them in any way. They were immaterial in every sense of the term and merely clutter up the record. The record is silent as to what ruling the trial court ultimately made respecting their admission.

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3. **THE DISTRICT COURT ERRED IN DENYING LIBELANTS RECOVERY OF WAR BONUS FROM THE DATE THEY WERE CAPTURED BY THE JAPANESE TO THE DATE THEY CROSSED THE 180TH MERIDIAN ON THE REPATRIATION VOYAGE.**

Assignment of Error No. 8: "The court erred in finding that respondent was not liable to the libelants and each of them for the payment of war bonus during internment on land or for any period subsequent to December 8, 1941, except for the period of repatriation voyage to a continental United States port until the 180th meridian was crossed westbound (eastbound)." (No. 11,943, A 616; No. 11,944, A 55.)

Assignment of Error No. 2: "The court erred in failing to decree that libelants were and each of them was entitled to the payment of war bonus during internment on land and until the 180th meridian was crossed westbound (eastbound)." (No. 11,943, N 615; No. 11,944, A 54.)

Appellants demonstrated in an earlier subdivision that the shipping articles were plain, certain, and

unambiguous, and clearly entitled the libelants to war bonus, at the rates stipulated therein, from the date of their capture by the Japanese to the date they crossed the 180th meridian on the repatriation voyage. The court therefore erred in finding the contrary. (No 11,943, A 592-594.) The court also erred in finding that respondent American President Lines was only obligated "to pay war bonus during the period of a repatriation voyage until crossing the 180th meridian eastbound." (No. 11,943, A 597.) And the court further erred in decreeing to libelants recovery only of war bonus on the repatriation voyage. (No. 11,943, A 606-609), and failing to decree recovery of war bonus during internment and until the 180th meridian was crossed eastbound.

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4. THE DISTRICT COURT ERRED IN DENYING LIBELANTS ANY RECOVERY OF MAINTENANCE.

Assignment of Error No. 9: "The court erred in finding that respondent was not liable to libelants and each of them for the payment or furnishing of maintenance during internment or for a period subsequent to December 8, 1941." (No. 11,943, A 616; No. 10,944, A 55.)

Assignment of Error No. 3: "The court erred in failing to decree that libelants were and each of them was entitled to maintenance during internment on land." (No. 11,943, A 615; No. 11,944, A 54.)

The question here involved is one of first impression. Although the shipping articles expressly pro-

vided for the payment of basic wages, emergency wages, and war bonuses "in the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage", no express provision was made for maintenance in such event.

The right of a seaman to board and lodging at the expense of the ship is a familiar and ancient law of the sea. His right to maintenance or subsistence is an incident to his calling. It is an implied term of every shipping articles he signs. Maintenance or its value is an integral part of the wages he is to receive.

In the early case of *The John L. Dimick,* D. C. Me. 1858, 13 Fed. Cas. 690, Case No. 7355, it was said, at pages 692 and 693:

> "The seaman engages to render faithfully all the services that pertain to the navigation of the ship, and all those that are naturally or by custom incident to that duty, as the making slight reparations of the ship in calking or painting the deck or other part of the vessel, which is occasionally required, and also in the loading and unloading the cargo, according to the custom of the trade in which she is engaged. But it has never, to my knowledge, been considered an incident to their general duty as mariners to occupy their time, while lying in port, in procuring provisions for the ship's use, either by fishing or otherwise. On the other hand the seaman stipulates for and the owner promises to pay the agreed wages. This stipulation and promise is embodied in the written contract. But there is always implied another stipulation and promise, though not put

in writing, that provisions for the board of the crew shall be furnished by the master and owners, and that these shall be served out to them in sufficient amount and of suitable quality. This proviso is just as binding on the owners as the written promise to pay their wages. To withhold from them an adequate supply, or to furnish food that is unwholesome, or of an unsuitable quality, is just as much a fraud on the contract, as it would be to pay their wages in clipped coin or depreciated bank bills. I am unable to see the ground on which a distinction can be made between one and the other. If it be a manifest wrong and fraud on the contract, it would be a reproach on the law not to furnish a remedy. What difficulties might present themselves in the refined and subtle technicalities of the common law is unnecessary here to inquire. The wrong is not beyond the remedies of the court, professing, like the admiralty, to decide ex aequo et bono, on enlarged principles of natural equity and universal justice. The seaman's contract so obviously includes board that it may be deemed unnecessary to refer to authorities in support of this. But the old sea laws were curiously directory on this as well as on other subjects. The Conselato del Mare (chapter 145) obliges the master to give the seaman meat three times a week, that is Sunday, Tuesday and Thursday, and wine every morning and afternoon, and double their rations on festival days."

In *The Bouker No. 2,* 2 Cir. 1917, 241 F. 831, it was said, at page 833:

"By the custom of the sea the hiring of sailors has for centuries included food and lodging at the

> expense of the ship. This is their maintenance and the origin of the word indicates the kind and to a certain extent the quantum of assistance due the sailor from the ship."

And in *Cortes v. Baltimore Insular Line,* 287 U. S. 367, 371, 53 S. Ct. 173, 174, 77 L. Ed. 368, it was said:

> "The duty to make such provision is imposed by the law itself as one annexed to the employment. Contractual it is in the sense that it has its source in a relation which is contractual in origin, but, given the relation, no agreement is competent to abrogate the incident."

By the shipping articles the American President Lines promised the seamen their basic wages per month. That the American President Lines was thereby obligated to pay the seamen full basic wages after the termination of the voyage and for the period of their internment and until their repatriation was completed, is not open to dispute. The question, then, is whether the words "basic wages" found in the shipping articles are to be construed as meaning only a specified number of dollars per month, or whether the words are to be construed as meaning a combination of a specified number of dollars per month and maintenance or the fair value thereof. In this respect, as in all others, the shipping articles must be construed most strongly against the American President Lines. (*The Thomas Tracy,* 2 Cir. 1928, 24 F. 2d 372, 373; *The Western Cross* (*McDonald v. United States,* 2 Cir. 1923, 292 F. 593, 594-595; *The Florence Olson,* 9 Cir. 1922, 283 F. 11, 12; *The Catalonia,* D. C. Va. 1916, 236 F. 554, 555-556.)

No one may doubt that under the shipping articles the seamen had a right to wages which included maintenance or the fair value thereof. A reasonable construction of the shipping articles, therefore, is that the words "basic wages" found therein express that concept and connote a combination of specified number of dollars per month *and maintenance or the fair value thereof.* That was the meaning originally given the words by the American President Lines, for it furnished the seamen with maintenance up to the time of their internment. There is nothing in the shipping articles from which it can be said that the words were to have a different meaning if the seamen were interned. On the contrary, the express promise made by the American President Lines in the shipping articles is to continue the payment of "basic wages" after the termination of the voyage. Although it is true that the American President Lines could not directly furnish the seamen with maintenance after their internment, it could still furnish or make available moneys for their maintenance. And as the answers to the libels show, even after the internment of the seamen moneys were advanced to some of them by the Swiss Consul at Shanghai for maintenance, *and the American President Lines guaranteed the repayment* thereof. (No. 11,943, A 22-24, 32-35; No. 11,944, A 21-23.) Clearly, any withholding or deduction by the American President Lines of that part of the "basic wages" of the seamen represented by maintenance or the fair value thereof would be, in the language of *The John L. Dimick,* D. C. Mc. 1858, 13

Fed. Cas. 690, 692, Case No. 7355, "just as much a fraud on the contract as it would be to pay their wages in clipped coin or depreciated bank bills", and "a reproach on the law not to furnish a remedy".

The District Court therefore erred in finding that libelants were not entitled to maintenance (No. 11,943, A 597-598), and in failing to award them maintenance (No. 11,943, A 606-609).

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5. **THE DISTRICT COURT ERRED IN FINDING AND DECREEING THAT ALL LIBELANTS WERE ENTITLED TO WAS A WAR BONUS ON THE REPATRIATION VOYAGE.**

Assignment of Error No. 7: "The court erred in finding that libelants were only entitled to the amounts decreed them." (No. 11,943, A 616; No. 11,944, A 55.)

Assignment of Error No. 1: "The court erred in decreeing that libelants were entitled only to the sums of money set opposite their respective names in the decree." (No. 11,943, A 615; No. 11,944, A 54.)

The court found that libelants were entitled to a war bonus on the repatriation voyage. (No. 11,943, A 596-597.) It awarded libelants such amounts and no more. (No. 11,943, A 606-609.) This was error. In other subdivisions of this brief it was demonstrated (1) that libelants were entitled to a war bonus from date of capture to date of crossing the 180th meridian eastbound on the repatriation voyage, and

(2) that libelants were entitled to maintenance or the fair value thereof from date of internment to date of liberation.

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6. THE DISTRICT COURT ERRED IN FAILING TO AWARD COSTS TO LIBELANTS.

Assignment of Error No. 4: "The court erred in failing to decree costs to libelants." (No. 11,943, A 615; No. 11,944, A 54.)

The court decreed that "the libelants and the respondent shall stand their own respective costs and that neither shall recover costs from the other". (No. 11,943, A 607-608.)

Appellants recognize that courts of admiralty have a wide discretion in giving or withholding costs. (1 American Jurisprudence 615, sec. 139.) But discretion may be abused. "The ancient characterization of seamen as wards of the admiralty is even more accurate now than it was formerly." *(Cortes v. Baltimore Insular Line,* 287 U. S. 367, 377, 53 S. Ct. 173, 176, 77 L. Ed. 368.) The avowed policy of the law is to relieve seamen from costs. (28 U.S.C.A., sec. 837.) Appellants submit that in view of that policy of the law toward seamen the trial court abused its discretion in failing to award them costs.

CONCLUSION.

Appellants therefore respectfully submit that the decree of the District Court should be reversed with directions to the court to award appellants (1) war bonus from the date of their internment to the date they crossed the 180th meridian eastbound on the repatriation voyage, (2) maintenance for the period of their internment, and (3) costs.

Dated, San Francisco,
July 26, 1948.

ALBERT MICHELSON,
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